No. 92-1981

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

—o—

STEVEN D. WIENER, et al.,

Petitioners,

v.

NATIONAL CITY, a municipal corporation; and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

---

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA 1

I RECENT DEVELOPMENTS UNDERSCORE THE NEED FOR GRANT OF A WRIT OF CERTIORARI HEREIN. 1

II THE CITY HAS MISREPRESENTED CERTAIN KEY FACTS IN THIS CASE. 4

III ALL THE ISSUES RAISED IN THE PETITION ARE PROPERLY BEFORE THIS COURT. . . 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bose Corp. v. Consumers Union of U.S., Inc.,
466 U.S. 485 (1984) 8

Renton v. Playtime Theaters, Inc.,
475 U.S. 41 (1986) . . . 2, 4, 8, 10, 11, 12

Young v. American Mini Theatres,
427 U.S. 50 (1976) 12

CONSTITUTIONAL PROVISIONS

First Amendment 3, 8, 9, 10, 12

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REPLY TO BRIEF IN OPPOSITION

I

RECENT DEVELOPMENTS UNDERSCORE THE NEED FOR GRANT OF A WRIT OF CERTIORARI HEREIN.

The need for this Court's review of the present ordinance is underscored by a recent article in the San Diego Union-Tribune (Wednesday, Sep-

tember 1, 1993) which summarized current tendencies in regulation of adult entertainment businesses by Southern California municipalities. The reporter interviewed San Diego City Attorney Ken Lounsberry who, according to the San Diego Union, stated that the City's "main attempt to regulate the establishment of adult businesses [in San Diego] would be to limit them to shopping centers of at least 350,000 square feet. There is only one center that large in the City."

By its decision in petitioners' case, the California Supreme Court has given a green light to any and all so-called "zoning" restrictions on adult businesses, regardless of whether their practical impact is to deny any "reasonable opportunity to open and operate an adult business in the City," as required by *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986). As the San Diego Union article confirms, California cities are rushing to exert their perceived new censorious powers.

Moreover, because the National City adult zoning ordinance imposes a virtual exclusion of

adult businesses but for its "shopping mall" exception, this case represents an ideal one in which to examine the proper limits on adult zoning legislation because it would not require this Court to become involved in any "micro management" of municipal government. Rather, the task at hand is simply to clarify whether the California Supreme Court was correct in concluding that *any* and *all* economic barriers selectively imposed upon adult speech businesses by a municipal zoning ordinance are constitutional, even if their operation and effect is to effectively deny any "reasonable opportunity" to open and operate an adult business in a city.

While petitioners agree that cities are not constitutionally required to guarantee the present existence and availability of viable commercial sites for adult entertainment businesses, nonetheless, they believe the First Amendment requires that if cities choose to enact zoning restrictions selectively directed against those engaged in a certain type of speech, cities must guarantee that those ordinances preserve a "reasonable opportunity" to open and operate an

adult business within their borders (as this Court held in *Renton*). Petitioners submit that this ordinance establishes selective economic barriers which, as a practical matter (and as in fact determined by the trier of fact herein) make it *impossible* for an adult speech business to open and operate in National City. It is critical that the California Supreme Court's distortion of this Court's adult speech business zoning jurisprudence be addressed by this Court.

II

THE CITY HAS MISREPRESENTED CERTAIN KEY FACTS IN THIS CASE.

In at least two key respects, the City, in its Brief In Opposition ("brief"), has misrepresented the facts established at trial.

First, at p. 4 of its brief, the City misled this Court in stating:

> "[I]n light of the torrent of negative publicity generated by Chuck's, . . . it is not surprising landlords were disinclined to offer Chuck's a new home.

Chuck's would have this fact construed against the City, in spite of the fact that Chuck's reputation was their own doing."

In fact, the record before the trial court is quite clear that petitioners' expert witness *never mentioned* Chuck's in any way when he asked the owners of the three qualifying existing shopping malls in National City whether they would rent to an adult business. Since the mall owners had no idea that the expert's inquiry was on behalf of Chuck's, the only inference that can be drawn from the landlords' refusal to rent to an anonymous adult business is that their refusal was based on a generic unwillingness to rent to adult businesses, and was not a rejection of Chuck's Books, specifically.

Second, at pages 4 and 5 of their brief, the City asserted, as if a proven fact at trial, that Chuck's could have built or modified an existing "strip mall" in compliance with the ordinance. However, the trial court made no such finding, and the City adduced no evidence to establish either how, whether, or at what

cost, a "strip mall" (which, by definition, would not seem to be the type of enclosed or concealed mall required by the ordinance) could comply with the ordinance. Rather, the uncontradicted evidence was that there were *only three malls* which qualified under the ordinance's mall exception, and that none of the three would rent to *any* adult entertainment business.

The City also misrepresented the record when it stated, at p. 4 of its brief, that the testimony "was consistent at the trial that . . . Chuck's could locate . . . on a four and one-half acre parcel . . . at 35th Street and National City Boulevard . . . ."

In fact, the City's experts disagreed as to the size of the parcel. One testified that the parcel constituted only a single acre, and based her statement upon authoritative maps prepared by the City. The City's other witness stated that the parcel was 4.5 acres but gave no foundation for this conclusion.

At p. 5, the City also misleadingly asserted that "Chuck's declined to purchase an existing building which could be modified to comply with

the dispersal ordinance." Yet, there is no evidence in the record of the existence of any such building, nor of any refusal by Chuck's to purchase any such building.

Finally, petitioners unequivocally reject the City's assertions that they have engaged in any "misstatements of fact" or "misstatements of law." The only slight inaccuracy in the petition is the summary sentence which describes the California Court of Appeal's disposition of the *prior* ordinance (an ordinance which is not before this court). Petitioners simply stated that "[t]he California Court of Appeal reversed on the ground that the ordinance *then* in effect was unconstitutional." (Emphasis in original.) To the extent that the affirmance of a preliminary injunction can *never* constitute a final determination of unconstitutionality, petitioners agree that this brief summary statement constituted a very minor overstatement. However, the court unquestionably made a finding of *probable* unconstitutionality based on the record then before it. However, for the city to characterize this as a "misstatement of fact" is itself, mislead-

ing. Moreover, there is no truth whatsoever to any of the other assertions of so called "misstatements of fact."

In any event, while the parties may disagree as to some of the relevant facts, this Court may make its *own* factual determinations based upon the evidence in the record at trial, given the First Amendment nature of the issues here at stake. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 501 (1984).

What is most important is that the parties do *not* dispute the key issue upon which this certiorari petition is based: the California Supreme Court's conclusion that cities are free to pass zoning laws imposing whatever unique and crippling economic barriers they wish upon adult speech businesses without any requirement that such ordinances will be reviewed under a test of whether they allow a "reasonable opportunity to open and operate an adult business in the city" as required by *Renton, supra*. Even in the very unlikely event that this Court, after reviewing the full record, would agree with the facts as described by the City, correction of this very

dangerous and erroneous statement of law by the California Supreme Court would nonetheless justify plenary review herein, as the principles established by that opinion will cause much mischief unless corrected.

Moreover, petitioners reiterate that they do not claim any blanket First Amendment immunity from any future public nuisance action. If, in the future, as the City failed to do below, the City established that Chuck's constituted a public nuisance, this Court's correction of the California Supreme Court's erroneous articulation of First Amendment law as applied to adult zoning legislation would not in any way limit the City's ability to enforce the remedies available under the California Public Nuisance laws.

III

ALL THE ISSUES RAISED IN THE PETITION ARE PROPERLY BEFORE THIS COURT.

The City has asserted that petitioners have raised "new issues not addressed before the California Supreme Court," particularly the issue of whether its ordinance is a narrowly tailored time, place, and manner restriction. Once again, the City is mistaken. Petitioners' briefs and arguments before the California Supreme Court unquestionably *did* examine whether this ordinance was a permissible time, place, and manner restriction. Petitioners repeatedly asserted that the ordinance violated the First Amendment requirements established by this Court in *City of Renton v. Playtime Theaters*, *supra*, in which, for the first time, adult zoning ordinances were found to be subject to analysis as "time, place and manner restrictions."

Although the emphasis of petitioners' briefs was on *Renton's* articulation of the requirement that the ordinance provide a "reasonable opportunity to open and operate an adult business in

the city", that is simply, according to *Renton*, an aspect of a proper time, place, and manner analysis for any adult zoning ordinance.

Similarly, petitioners' briefs repeatedly asserted that the ordinance was broader than necessary for any legitimate municipal purpose. Although the precise talisman of "narrow tailoring" was not specifically articulated in petitioners' briefs, their emphasis on this point by challenging the lack of any legitimate purpose which would support the breadth of the restriction, was clearly sufficient to raise it adequately below.

Finally, there is certainly no additional requirement, as apparently implied by the City, that every case cited to this Court must have been cited to the lower court.

CONCLUSION

The constitutional principle espoused by the California Supreme Court (*i.e.*, that all economic considerations must be ignored under all circumstances and no matter their impact), clearly

conflicts with *Renton's* articulation of the First Amendment requirement that adult zoning ordinances allow a "reasonable opportunity" to open and operate an adult business in a city.

This Court should grant review herein to reaffirm the correctness of the test set forth in *Renton*, and to make clear that *any* adult zoning ordinance must, in the final analysis, be found by the trier of fact to allow at least a "reasonable opportunity" to open and operate in a city. Unless this Court acts, it is clear (as has already begun) that there will be widespread enactment of ordinances of this type which, while seemingly designating adequate space for adult speech businesses, will pretextually allow only locations which, as a practical matter, could *never* be successfully acquired or operated by *any* adult entertainment business. In the final analysis, the First Amendment rights of the millions and millions of viewers of such materials will be most greatly affected, in clear violation of this Court's promise in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), that such ordinances are permissible

only if they do not significantly impair the availability of such materials.

For all these reasons, petitioners urge this Court to grant a writ of certiorari.

DATED: September 13, 1993

Respectfully submitted,

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